1952

# Flora S. Mecham et al v. Arthur R. Allen, J. H. Allen et al : Brief of Appellants

Utah Supreme Court



Fabian, Clendenin, Moffat and Mabey; Peter W. Billings; Attorneys for Defendants and Appellants;

# IN THE SUPREME COURT
# of the
# STATE OF UTAH

FLORA S. MECHAM, et al
*Plaintiff and Appellee,*

vs.

ARTHUR R. ALLEN, J. H. ALLEN, et al
*Defendants and Appellants.*

Case No. 7865

## BRIEF OF APPELLANTS



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## STATEMENT OF FACTS

This appeal is from a jury verdict and an order of the court denying Defendants Allens' motion for a directed vedict or a new trial. The action was brought by Flora S. Mecham, the widow of Thomas Udell Mecham, for damages for the alleged wrongful death of her husband and by Flora Mecham and her three minor children for their personal injuries, the death and injuries resulting from an automobile accident near Bridal Veil Falls in Provo Canyon on July 4, 1950.

The Mechams had left their home in Wallsburg, Wasatch County, early on the morning of July 4, and had gone down to Provo to watch the Independence Day Parade. The accident occurred shortly before noon, as

they were on their way back up the canyon to their home. Thomas Mecham was driving a 1941 Chevrolet coupe, and Mrs. Mecham and the two younger children were in the front seat, Linda lying on the seat between Mr. and Mrs. Mecham and the baby, Gary, on her lap. The older boy, Leonard, was in the back seat. The canyon was very heavily traveled that day and cars going up the canyon were proceeding in a steady stream.

The canyon road immediately below Bridal Veil Falls is a straight-a-way which culminates in an "S" curve to the right just at the base of the Falls. (Exhibit "8" is a map and Exhibits "A", "B", "C", "2", "3", "11", and "12" are photographs of the scene). The hard surfaced portion of the highway is 21 feet wide with gravel shoulders of varying widths. The highway was divided into two lanes by a solid yellow line with broken white lines on either side. Just as the Mecham car was entering the curve, it was involved in a collision with a 1950 Ford Tractor and Trailer unit driven by Arthur R. Allen, a son of J. H. Allen, two of the Defendants herein.

The truck, which was designed and used for hauling cattle, had been purchasd new in May, 1950, by Mix Johnson, the other Defendant. On June 7, 1950, Johnson had agreed to sell the truck to J. H. Allen. Allen paid Two Thousand Dollars ($2,000.00) down with the agreement that the balance would be paid when Allen sold his wool in the fall, Johnson to retain title until the purchase price was paid in full. Johnson had just acquired an insurance policy on the vehicle and agreed to keep it in force until the title was transferred. Relying on this,

Allen had purchased no insurance on the truck, and Johnson's insurer, upon discovering the facts, in June 1951, withdrew from the defense of the case and has denied liability. The Allens then employed their own counsel.

On July 3, 1950, Arthur Allen, accompanied by his cousin by marriage, Dale Mousley, left the Allen farm in Draper, Utah, to take the truck to Wendover where, in conjunction with Johnson and others, the Allens were hauling cattle for the Jordan Brothers to the summer range above Hewlitt's Ranch, approximately twenty (20) miles East of Heber City, Utah. They picked up the cattle and, alternating driving, proceeded to the ranch, unloaded the cattle, and were on their way back empty to the Allen farm when the accident occurred.

Other than the occupants of the vehicles involved, no creditable witnesses to the accident were produced at the trial. Thomas Mecham, the driver of the car, was killed, and his widow, the Plaintiff, testified that she had been looking out her side of the car and did not see the truck until just before the crash. Arthur Allen was confined to his bed at the time of the trial with rheumatic fever, incurred since the accident, and testified only by deposition, which had been taken by Plaintiff as a part of the pre-trial discovery procedure. He testified that while he was still in the bend, the Mecham car swerved at him. He cut the truck off his side of the road and "hit the brakes," leaving marks where he left the road. The other occupant of the truck, Mousley, was present in court and testified that he was not observing the

highway particularly and his first sight of the Mecham car was as Allen called "Look out" and swerved the truck.

As a result of the impact, the left side of the Mecham car was demolished. Mecham was killed and Mrs. Mecham and the children received injuries. Mrs. Mecham had her nose broken and scalp cut. At the time of the trial, these had completely mended except for a slight scar on her forehead which her doctor described as "very faint," and she complained of headaches and backaches when she overworked. The two older children's injuries were slight, but the baby, Gary, was seriously injured.

The occupants of the truck were not seriously injured, but the force of the impact twisted the rear wheels of the truck, broke its rear springs and the drive shaft, and bent the frame of the trailer and sheared the springs on its left rear, locking its wheels (Exhibit "5".) There was no damage to the right side of the truck or trailer. There was a slight, fresh dent in the rear of the left front fender of the truck (Exhibit "13"), but the main force of the impact was on the left rear of the truck and left side of the trailer. Immediately after the collision, the Mecham car was facing diagonally across the road, its front end projecting into the lane for down canyon traffic with considerable debris in front of it in the down canyon lane (Exhibits "1" and "D".) The truck and trailer were off the highway below the car with only the left front wheel on the hard surfaced portion. The investigating officers found gouges in the hard surface extending from the debris in the down lane to the point where the front end of the automobile came to rest.

They also found tire burns about four (4) feet North of the center line in the down lane extending to the left rear of the truck. The gouges are marked "G" on Exhibit "8" and the burns "B". To assist in visualizing the surroundings and accident, we have inserted herein a reproduction of the map (Ex. 8).

Counsel for Plaintiff did not cross examine any of the investigating officers and presented as part of their case in chief as to how the accident happened only Flora Mecham, the Plaintiff, W. O. Mecham, her father-in-law, and Otis L. Ercanbrack, a neighbor from Wallsburg. On rebuttal, Plaintiff produced one Alfred M. Carter, who Plaintiff claimed was not discovered until the week end recess of the trial in January, 1952, although he had worked all during the period in the same small group with Plaintiff's father as a fellow employee of Utah Construction Company at the Geneva Steel Plant. Carter purported to have been fishing in Provo Canyon the day of the accident and placed the locale of the accident considerably above the point fixed by all other witnesses on both sides. Carter also testified the truck was moved after the accident, although the undisputed physical evidence was that it could not be moved without the use of a wrecker.

The trial court dismissed the action against Johnson, dismissed Allen's cross complaint against him arising out of the failure to have insurance on the vehicle, denied the Allens' motion for directed verdict, and submitted the issues to the jury. The verdict of the jury gave $30,000.00 for the death of Mecham, $7,500.00 for

the personal injuries to Gary Mecham, $5,000.00 for the injuries to Flora Mecham, zero general damages for the injuries to Linda and Leonard, and assessed special damages in accordance with the prayer of the Complaint as amended.

It is Defendants' position that the undisputed physical evidence fixed the collision in the Allen lane of traffic, and on that ground, Arthur Allen could not have been negligent, there being no testimony as to other grounds of negligence which could have been a proximate cause of the accident. Defendants further contend that they were prejudiced by the court's instruction as to the presumption of due care on the part of Thomas Udell Mecham and that they should have had a new trial, if not a directed verdict, because of the surprise testimony of Carter and the availability of other evidence to discredit such testimony.

## STATEMENT OF POINTS

I. THE COURT ERRED IN FAILING TO DIRECT A VERDICT FOR DEFENDANTS ALLEN.

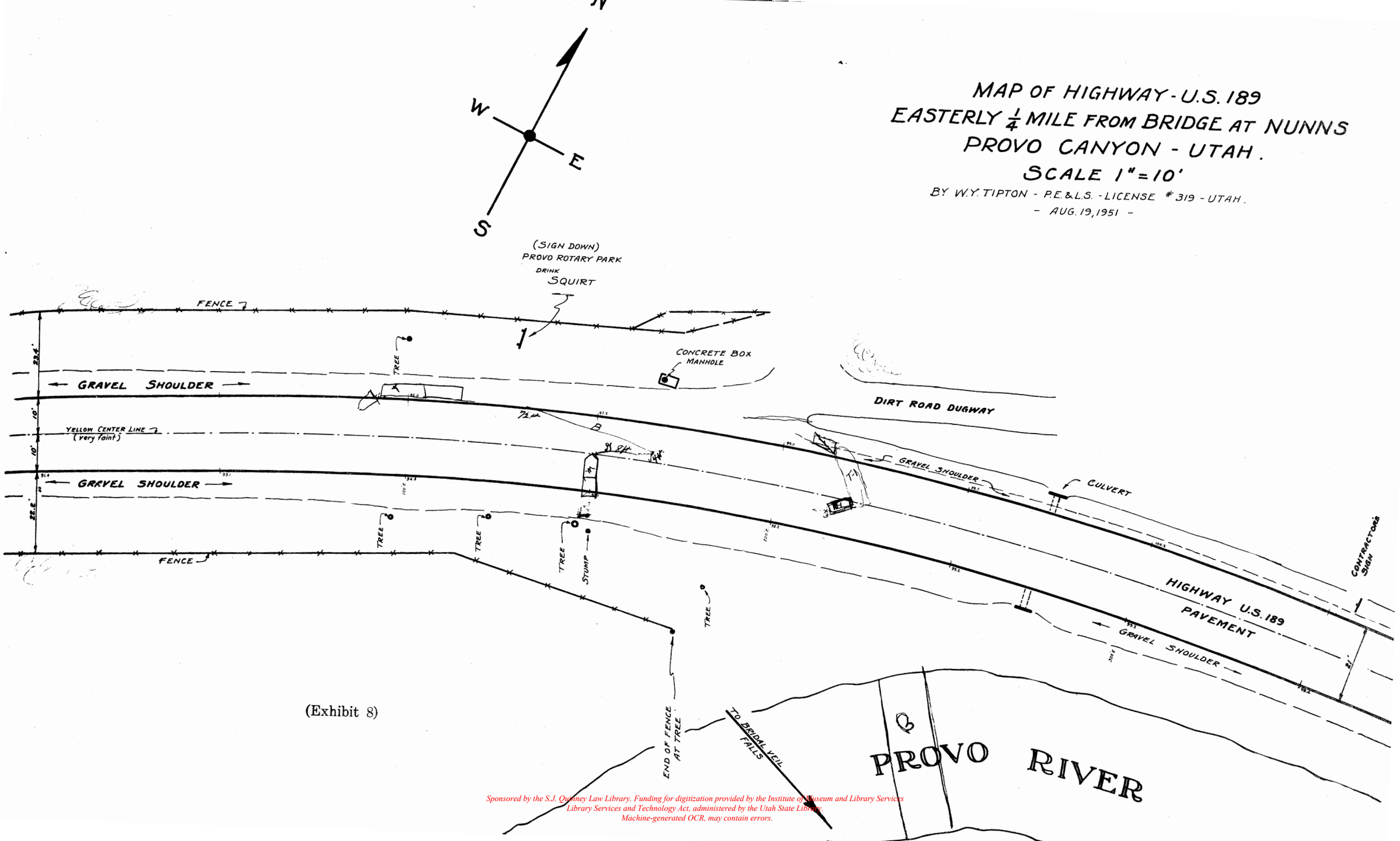
   A. *There is no creditable evidence that Arthur R. Allen was negligent.*

   B. *Thomas Udell Mecham was negligent as a matter of law.*

II. THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE PRESUMPTION OF DUE CARE ON THE PART OF THOMAS UDELL MECHAM.

# MAP OF HIGHWAY - U.S. 189
## EASTERLY 1/4 MILE FROM BRIDGE AT NUNNS
## PROVO CANYON - UTAH.
## SCALE 1" = 10'

BY W.Y. TIPTON - P.E. & L.S. - LICENSE # 319 - UTAH.
- AUG. 19, 1951 -




(Exhibit 8)

III. THE COURT ERRED IN FAILING TO GRANT DEFENDANT A NEW TRIAL.

A. *Surprise, or the strange case of Mr. Carter.*

B. *Newly Discovered Evidence.*

## ARGUMENT

I. THE COURT ERRED IN FAILING TO DIRECT A VERDICT FOR DEFENDANTS ALLEN.

A. *There is no creditable evidence that Arthur R. Allen was negligent.*

It is Defendants' contention now and was at the trial that the undisputed physical evidence in the case established that the Mecham car was on the wrong side of the road when the collision occurred and that, in conformity with the well established rule that oral testimony to the contrary must yield to the undisputable physical facts,

*Haarstrich vs. O. S. L.,* 70 Utah 552, 262 Pac. 100;

*Lavigne vs. Nelson,* (N. H.) 18 At. 2d 832.

a finding should have been entered that Mecham was negligent as a matter of law in being on the wrong side of the road. Defendants further contend that there was no creditable evidence to submit to the jury of negligence on the part of Arthur Allen in the driving of his father's truck.

No one at the trial was an actual eye witness able to describe how the accident happened. Flora Mecham, the Plaintiff, testified on direct examination as follows:

"Q. Did you observe any automobiles coming down the canyon just prior to the crash?

A. Yes.

Q. Did you observe the other vehicle involved in the crash before the crash occurred?

A. Yes.

Q. Will you describe in your words what you observed?

A. Well, I was looking out on the road, rather to the side, my side, and a car passed us and then I turned and seen this big truck, just swaying like that.

Q. Where was this big truck in relation to the highway itself when you saw it?

A. Well, it just seemed like it was over on the side of the road.

Q. And did you have an opportunity prior to the crash to make any further observations?

A. No.

Q. Do you know in what lane of traffic your car was immediately prior to the crash and the time of the crash?

A. Yes, I do.

Q. What lane were you in?

A. We was in our own lane.

Q. And in relation to the yellow line which divides up canyon from down canyon travel, where was this semi-trailer just immediately prior to the crash and when the crash occurred?

A. Well, it seemd to me where I seen it, he was over on our side of the road.

Q. Do you have any judgment as to how far over on your side?

A. No, I don't." (R. 269-270)

And on cross examination, Mrs. Mecham testified:

"Q. Do you recall what part of the truck you saw when you looked, turned and looked at it just before the accident happened? I think that is the way you testified. Do you recall what part of the truck you saw at that time?

A. Well, that truck was coming and it seemed to me like it was coming fast and was swaying so that I couldn't see the whole truck itself, like it was standing still, but I could see the bed of that truck sway.

Q. In other words, the thing that you saw at that time was a bed and that was right up against your automobile at that time, was it?

A. No.

Q. How far was the bed from you at that time, Mrs. Mecham?

A. I don't know.

A. And before you made that observation you had been looking out the side of the car as you were going up the canyon?

A. Looking out my window on my side.

Q. And then you turned around and saw the bed of the truck and the accident happened almost simultaneously. Isn't that right?

A. Yes." (R. 278.)

Taken together, her testimony was that she was looking out her side of the car, just before the collision she looked to the left, saw the bed of the trailer swaying,

it "seemed like it was over on the side of the road", and the accident happened almost simultaneously as she saw the truck. Whether in reconstructing a flash observation some year and one-half later, she gave the impression she thought must have happened to place blame on a party to a collision in which her husband was killed and she and her family injured, or whether a 45-foot truck and trailer in negotiating the curve would seem to be swaying to her side, we cannot tell, but certainly the flash observation and the limited opportunity she had to observe is not substantial evidence upon which the issue of negligence on the part of Arthur Allen may be submitted to a jury.

*Seybould vs. Union Pacific,* ..... Utah ..... 239, Pac 2d 174.

The only other witness produced by Plaintiff who purported to testify as to the events immediately preceding the collision was one Otis L. Ercanbrack who was a neighbor of the Plaintiff and her famliy in Wallsburg, Utah. Ercanbrack was also returning to his farm in Wallsburg after the parade in Provo. He was driving an F3, ¾ ton Ford truck (R 234), and was fourth in line up the canyon behind the Mecham car (R 243). He could see no better in the truck that he could in an ordinary passenger car (R 235). When he crossed the bridge just below the scene of the accident (Exhibit 17), he was going 35 miles per hour (R 236) and the cars were about bumper to bumper or 3 feet apart going up the canyon (R 247). Until the accident, he did not slow down (R 244). He testified as to the how the accident happened as follows:

"Q. Will you describe more in detail, Mr. Ercanbrack, this truck that was coming down the canyon?

A. Well——

Q. And that was involved in the accident, of course?

A. As I remember it, there was an old Chev, car or else a Ford, I don't know which it was, a two-passenger car, coming ahead of the truck and the truck came down and he was evidently passing him.

Mr. Hansen: Well——

A. And as he got down close to where the collision happened, the other old—the Chev. car or Ford, whichever it was—they passed on and he throwed his engine, and of course, he kind of turned out on the other side of the road. Then this here collision happened. That car come up just as hard as it could come. Well, it was the traffic, and it just happened that quick." (R. 237-238)

And as follows on page 239 of the Transcript:

"Well, the Mecham car. About that time I thought I could get by it and I pulled out to the right and I went right up to the side after he hit and I pulled up to the side and I see I couldn't get through. So he hit the car and went right up under the back wheels. Right under the truck, under this here trailer-truck, and then the drivers, it seemed like they had, they backed up three times and lossened the loose end quite a bit and then there was an old gray headed gentleman, quite elderly man, he come up to me and asked me if I would go out, if I would get out of the road; I had pulled up too close, and I told him I would

get out if I could and he says, 'We'll make room for you' and they had at that time gotten the truck off Tom's back and by that loosened the truck up when he shoved it back, tried to back up. They had gotten Tom's truck back; that was right to the corner of the truck, so they could get Tom out and they got him out and laid him down by the cement road there and the car was a little bit, was about like that shape and this old gentleman, he got some other man and just shoved around about two feet and then he let me go out and I just missed the stump and went out on over here. That is about all I, I left then and went on home."

And at page 246, on cross examination, he said:

"Q. Did you see the truck coming around the curve in the canyon there, the curve where the accident occurred?

A. Well, just up, about seventy five feet, or something like that.

Q. Well, was the truck coming around the curve when you first saw it; before it collided with the automobile?

A. When I first saw the truck he was going to pass this old Chev car.

Q. I know, but where was the truck then with reference to the curve in the highways ahead of you?

A. About seventy five feet up the road.

Q. Around the curve?

A. Oh just ahead of us there. The curve came around like that. The road was so bad you couldn't have seen it much further; seventy five or one hundred feet.

Q. Is it your testimony you could see the truck

passing this car seventy five feet up-canyon from the curve? Is that your testimony?

A. Well, where the accident took place. That is my testimony. When he seen these cars in front the the truck evidently, the way it looked to me, pulled his truck across and engine across the side of the road.

Q. I thought you told us in your direct examination he had completely passed this car?

A. No, I didn't tell you anything of the kind. He got his cab across, past over the line and that is when the Mecham car hit him.

Q. Well, do I understand you to say the tractor part, or the cab part of the truck was over on the right side of the road?

A. Yes.

Q. Over the center line?

A. It just got over the center line and then they hit.

Q. And the trailer was still back over the center line?

A. Yes sir."

And at page 248-249:

"Q. Let me stand right over here and then everybody can see everybody here. Now Mr. Ercanbrack, if the tractor, or the cab part, as you designated, of the truck was on the lane of traffic for down, that is for westbound traffic, and if the trailer of that unit was over on the lane of traffic for up-canyon that would require a very sharp turn on the part of that unit, would it not, to get the truck in that position?

A. Well, not the way that I looked at it because

this here old Chev car moved out of his way and he slowed up a little, he immediately slowed up and started to turn out of the road but he didn't get off quick enough and Tom come along and hit him.

Q. Then your testimony is that the truck unit was coming down the curve on the wrong side of the road trying to pass this old car? Is that what you saw?

A. Yes sir. That is my testimony. That is the way I saw it."

Ercanbrack further testified that he could stop his car within a foot when going 35 miles per hour (R. 245); that the Mecham car and the Allen truck stopped right at the point they came together (R 250); that the truck backed off the Mecham car (R 239, 249); and that a group of by-standers "as thick as flies" lifted up the truck and trailer weighing 8½ tons (Exhibit "16") and pulled the Mecham car back from under it (R 241, 242, 251).

Of course, each of those latter statements is a physical impossibility. Anyone knows that a car going 35 miles per hour cannot be stopped in one foot. The vehicle would travel approximately 51 feet during the reaction time and substantially twice that far after the brakes were applied. Nor would the car and truck have stopped right at the point they came together. The truck and trailer weigh 8½ tons empty (Exhibit "16") and were going 30 miles per hour (R 304) just before the accident. The car weighed a little over 1½ tons (Exhibit "15") and was going 35 miles per hour at the time

of the accident if it was at the head of the column in which Ercanbrack was traveling at that speed. Under such conditions, the vehicles would not stop as they came together. Either the truck would drag the car or the car would be thrust back from a point of impact by the additional weight of the truck. Nor could a group of men lift a trailer, weighing at the rear end, 5,760 pounds (Exhibit "16") and drag the Chevrolet out from under. Nor could a truck with its drive shaft broken back up under its own power (See Exhibits "5" and "6").

It is submitted that the other testimony of Ercanbrack is equally incredible and not capable of belief. First, as to his *ability* to see. By his own testimony he was traveling 35 miles per hour, fourth in a column of cars approximately 3 feet behind the car in front of him. How much would he see of events seventy-five feet up the road when his attention at that speed and under those crowded conditions necessarily would be on the vehicle directly ahead? And if he had been looking, how much could he see? Plaintiff's Exhibits "A", "B", and "C" indicate clearly the limited visibility from the area in which Ercanbrack must have been when the accident occurred. They show that one could not see a vehicle any farther up canyon that the vehicle shown in Exhibit "11" which is in the same position as the vehicle in Exhibit "C" (Compare the bushes at the right of the gate in each picture). Nor could he have been any closer to the scene than the point where the photograph (Exhibits "A", "B" and "C" were taken. Ercanbrack testified he did not apply his brakes until the accident. If the

cars were as close together as he described, they would have all telescoped when the Mecham car hit the truck. There is no evidence any such thing happened. Ercanbrack would have travelled fifty feet from the time he was aware of the collision until he applied his brakes and another 100 feet to stop. In addition, there were two cars between him and the Mecham car or a total of 32 feet; so that he was over 180 feet from the curve when the collision occurred. Similarly, the truck was at least another 44 feet above the point where the brake marks first appeared, that being the distance traveled at 30 miles per hour during the reaction time of Arthur Allen. Both the brake marks observed by W. O. Mecham (R 128) and those observed by investigating officers (R 323, Exhibit "8") were above the location of the Mecham car. Therefore, Ercanbrack was at least 220 feet from the truck when the collision was imminent and he could not have observed the truck attempting to pass a black "Ford or Chev" as he testified, around the curve where it must have been. Even Ercanbrack admitted that you could not see over seventy-five or a hundred feet from the curve (R 246). Exhibit "2" clearly shows how limited is the visibility around the curve looking up canyon.

Secondly, as to what he says he saw, Ercanbrack testified that the truck attempted to pass a car traveling down canyon ahead of it, observed the Mecham car, attempted to pull over, got the front of the truck out of way, leaving the trailer three-fourths over in the Mecham lane, (R 240). But the first point of impact was the

rear of the left front fender (Exhibit "13"). If the tractor was cutting back into its own lane, as Ercanbrack claimed, leaving the trailer in the wrong lane, the Mecham car could not have creased the fender in the manner shown in Exhibit "13". The first impact would have been to the rear of the cab, not on the front fender.

Nor would anyone be likely to drive in the manner described by Ercanbrack. All agree the canyon was crowded with holiday traffic. Would anyone with the slightest regard for his own safety attempt to pass a car on a blind curve under such conditions of traffic? Yet, that is the story neighbor Ercanbrack tells. It is striking that Ercanbrack, who was the third car behind Plaintiff, is the only purported eye-witness produced by plaintiff. White, the occupant of car No. 4 admitted he did not see anything but commotion (R 173). What happened to the occupants of cars No. 1 and 2? Plaintiff's diligence produced the mysterious fisherman who had been working all the time with Plaintiff's father, but that diligence failed to produce any real eye-witness.

W. O. Mecham, father of Thomas U. Mecham, the deceased, also testified as to some tire marks (R 127) which he placed on his drawing (Exhibit 17) on the turn just over the center line, although only a few months before he had testified on deposition that he had seen no brake marks, tire marks or debris (R 141-42) and made no attempt to correct that statement in his deposition when he signed it (R 143). He also admitted (R 144) that his testimony as to marks was based on his observation and discussion with his attorneys at the scene

of the accident in the late fall of 1950.

On the basis of the foregoing testimony, Defendants contend that the issue of the negligence of Arthur Allen should not have been submitted to the jury. Mrs. Mecham had only a flash before the collision and could not have observed how it happened or where the truck was. Ercanbrack's testimony is so incredible as to be incapable of belief, and W. O. Mecham's testimony as to tire marks was, by his own admission, discredited. As was stated by this Court in

*Dalley vs. Midwestern Dairy Products,* 80 Ut. 331, 15 Pac 2d 309.

> "Where the evidence relied upon by Plaintiff to establish some material issue of this alleged cause of action is apparently impossible of being true in light of facts which are established beyond controversy, then and in such case, it becomes the duty of the Court to take the cause from the jury and deny Plaintiff the relief prayed."

B. *Thomas Udell Mecham was negligent as a matter of law.*

The testimony of the investigating officers of the Utah Highway Patrol, Evans and Clark, as to the physical facts they found, testimony not even attempted to be attacked by the Plaintiff by cross examination or otherwise leads but to one conclusion: The Mecham car was on the wrong side of the road when the collision occurred. Under such circumstances that is negligence as a matter of law.

Sections 57-7-120, 57-7-121, and 57-7-171, Utah Code Annotated, 1943, as amended.

*Staton vs. Western Macaroni Manufacturing Company*, 52 Utah 426, 174 Pac. 821.

*Turrietta vs. Wyche*, (N. Mex) 212 Pac 2d 1041; *Jones vs. Cary*, 219 Ind. 268, 37 NE 2d 944.

Evans, the officer in charge, placed the truck about 72 feet down the road, off the highway on the right-hand side directly under a tree (Exhibit "8"), and the Mecham car on the South side of the front extending into the middle of the road (R 323 and Exhibit "8"). With respect to tire burns, Evans testified as follows: (R 323)

"Q. And will you describe the position of the tire burns with reference to the truck and the hard surface as to where they were on the highway?

A. The tire burns started about four foot north of the center line.

Q. Now in which lane of traffic would that be, Officer?

A. That would be in the lane of traffic for the automobiles moving down the Canyon.

Q. That would be the lane of traffic for down canyon traffic?

A. That's right.

Q. And then where did they go, if anywhere?

A. They extended to a point to the rear of the truck that was off on the north side of the road."

He stated with respect to debris and gouges as follows: (R 323-24)

"Q. Now did you see any other marks upon the highway in the vicinity of the point where those tiremarks began? That is, where they began up canyon from the truck?

A. Yes, There were some, a lot of debris there. There was some gouges in the oil surface and the gouges extended to the point where the automobile came to rest."

Both these tire marks and gouges are shown drawn by Officer Evans extending to the truck and the car respectively (Exhibit "8", R 330). Evans further described the damage to the truck and trailer as follows:

"Q. Well, I am coming to that, Your Honor. I will withdraw that question at this time and ask you to describe generally the damage to the truck as you remember it?

A. The front wheels of the, the rear wheels of the tractor was knocked out, the spring hangers on the tractor was broken, the drive shaft was down, the tractor part. The rear wheels of the trailer was knocked out, turned so they weren't tracking. The spring hanger on the rear trailer was down." (R 333-34)

Officer Clark testified substantially to the same effect as did Evans and further testified that there were no other car burns or brake marks above or below the marks described (R 346-47). As with Evans, the Plaintiff did not cross examine Clark.

Leo Hales, service manager of Naylor Motor Company in Provo, who was called to remove the vehicles, also testified that the drive wheels of the truck were sheared out from the truck, the driveshaft broken, and the wheels of the semi-trailer sheared off and locked (R 403) so that neither the tractor nor the trailer could be moved without a wrecker and another tractor. No attempt to discredit his description of the physical con-

dition of the tractor was made by counsel for Plaintiff.

It is submitted that this undisputed physical evidence establishes that the impact occurred in the Allen lane of traffic. The gouges running for a distance of eight feet to the front end of the Mecham car from a point four feet into the Allen lane conclusively show that Mecham car must have been four feet into the wrong lane when the impact knocked the frame of the car off its axle (Exhibit "D") and made the gouges as the car was thrown back. Similarly, the tire burns running to the left rear end of the trailer( Exhibit "8") show that the truck was four feet inside its lane when the impact broke the wheels and set the brakes, causing the burns.

Only recently this Court has recognized the doctrine that undisputed physical evidence overcomes oral testimony.

> *Moser vs. Zion Co-operative Mercantile Institute,* 197 Pac 2d 136.

And other Courts have applied the principle in cases where the facts were quite similar to the case at bar. That principle was stated by the New Hampshire Court in

> *Lavigne vs. Nelson,* Supra.

as follows:

> "Although ordinarily it is the province of the jury to resolve conflicts in oral testimony, here the inferences to be drawn from the undisputed location of the marks on the highway, from the appearance of the sedan and the truck, and from the admitted measurements so decisively demonstrate the collision occurred on the East side of

the road, that all testimony to the contrary must be rejected. It is a well-established rule that oral testimony must yield to indisputable physical facts."

In that case involving a collision between a truck and an automobile, all the passengers of the automobile testified that their car was on the right side of the road, and that none saw the truck until just before the collision. Yet, the physical evidence was that dual tire marks were on the shoulder of the truck's side of the road, gouge marks on the truck's side of the center lane and scuff marks of the car ran from the gouge marks to the position of the car after the collision. On that basis, the Court directed a verdict for the Defendant.

The Tenth Circuit, in a case strikingly like this case,

*Chambers vs. Skelly Oil Company,* 87 Fed. 2d 853,

had the following fact situation before it:

The accident involved a collision between a truck and a trailer weighing between 17 and 18 tons and being between 35 and 40 feet in length and an automobile weighing about 2900 pounds. They were proceeding in opposite directions. The driver of the truck testified that the car approached the place of the accident about 70 miles and hour on his side of the road. Just before the accident, the car turned to the truck's side, swerved back to the other side and then turned back to the truck's side of the road and collided with the left front end of the truck. The truck had been on the South half of the road traveling at a speed of 32 to 33 miles an hour. When he observed the car turning toward his side of the road,

he slowed down the truck and turned it off the oiled mat toward the ditch on the side of the highway. The driver of the automobile testified that he was driving about 45 miles an hour, that the truck swerved over into his side of the highway about three or four feet over the center line. He thought the truck would get back to his side of the road and turned his car over as far as he could on his side of the road as possible. A number of disinterested witnesses, including the investigating officers and highway workers, found the front end of the truck in the ditch off on the side of the highway and the coupe in the center of the road, the rear of the truck headed toward the opposite direction. They were able to trace the tracks of the truck back for a distance of fifty feet from the rear end of the truck. The right wheel tracks were off the mat on the soft shoulder of the road and the left wheel on the South half of the mat. The shoulder was soft and the tracks were plain. They indicated the truck had gradually pulled over to the South edge and off the mat. They also found tracks of the coupe where it skidded to the South edge of the oiled mat and back toward the center and up to the point of the collision. They found broken glass along the side of the road scattered over the oiled mat. They also observed some holes freshly gouged in the oiled mat about halfway between the center line and the South edge of the mat and opposite the cab of the truck. Photographs of the coupe taken after the accident, indicated nearly all the left half of the front of the coupe collided with the truck. On the basis of this evidence the Tenth Circuit Court said:

"The rule is likewise settled that when the testimony of a witness is positively contradicted by the physical facts, neither the Court nor the jury can be permitted to credit it (citing cases). The tracks, scars in the pavement, broken glass and other physical facts show beyond doubt that the truck was on the South side of the road and the coupe swerved or skidded from the side of the road and collided with the truck on the South side of the road. That a 2900-pound automobile traveling 45 miles per hour, colliding with a 17-ton truck would knock the truck from position four feet North of the center line across and off the pavement on the South side is unreasonable. Had the collision occurred, as Chambers testified, on the North side of the oiled mat, it is reasonable to assume that the light coupe would have been hurled into the ditch on the North side and not the heavy truck into the ditch on the South side. It is undisputed that the coupe remained on the oiled mat after the collision."

On that basis, the Court concluded that the trial court did not err in directing the verdict for the truck. See also

*Schultz vs. General Casualty Company,* (Wisc.) 288 N. W. 803,

to the same effect.

So in the case at bar the brake marks, gouges and positions of the vehicles establish, without doubt, that the collision occurred in the Allen lane of traffic. There can be no dispute that the gouges leading to the Mecham car were made by it when thrust back by the force of impact. There can be no doubt that the brake marks were made by the Truck after the impact locked the rear wheels. There can be no doubt that a collision be-

tween a 9 ton truck and an ordinary passenger car in the south lane of traffic would not throw the heavy truck to the north side of the road and leave the passenger car to the north of the point of impact, but would have exactly the opposite result. There can be no doubt that the Mecham car was at least 4 feet north of the center line when the collision occurred.

II. THE COURT ERRED IN INSTRUCTING THE JURY AS TO THE PRESUMPTION OF DUE CARE ON THE PART OF THOMAS UDELL MECHAM.

The Court, in its Instruction No. 11, instructed the jury as follows:

> "You are instructed that, until the contrary is proven, there is a presumption that the deceased, Thomas Udell Mecham, was exercising due and proper care for the protection of his person and the preservation of his life, at the time of the accident; this presumption arises from the instinct of self preservation and the disposition of man to avoid personal harm. This presumption is not conclusive, but is a matter to be considered by the jury in connection with all other facts and circumstances in the case in determining whether or not the deceased, Thomas Udell Mecham, was guilty of contributory negligence at the time of the accident." (R 55)

The giving of this instruction constituted prejudicial error in two respects.

In the first place, it does not correctly state the law as to the presumption of due care on the part of the deceased. The court's instruction state: "Until the contrary *is proven.*" As this Court only recently has pointed

out, the presumption of due care on the part of a decedent merely "places on the opposing party the burden of going forward with the evidence or of making a prima facie case on that issue."

*Tuttle vs. Pacific Intermountain Express Co.,*
.....Utah....., 242 Pac 2d 764.

The instruction, as given by the Court below, required Defendants to prove, apparently by the preponderance of the evidence, that Thomas Udell Mecham was not exercising due care in the operation of the Chevrolet automobile before the presumption would disappear. In the Tuttle case, this Court held that an instruction as to the existence of the presumption of due care "in the absence of evidence to the contrary" was confusing where there was such evidence. Here the requirement of the instruction is affirmative proof, not merely of presenting some evidence. As stated by Mr. Justice Wolfe, in the Tuttle case, as to the required burden of Defendant with respect to this presumption.

> "The 'required burden' as used in the quoted sentence, I assume, is not that of satifying a particular quantum of proof or of introducing enough evidence to satisfy the jury that the presumption or presumptive fact is overcome. *The burden is only that of going forward.* If this is kept in mind, I see nothing wrong with that particular statement. Then it is for the Court to determine whether the 'opposing party' has gone forward by introducing *some* evidence of how the accident happened, but if so, it does not need to be sufficient evidence to satisfy the jury or fact finder that the presumption has been overcome, but only

some evidence as to how the accident happened." (242 P. 2d 764, 773.)

Secondly, the giving of *any* instruction with respect to the presumption was prejuidicial error, as the Defendants more than met their burden of going forward with evidence. As said by this court in the Tuttle case,

> "The ordinary presumption merely places on the party claiming the non-existence of the presumptive fact the burden of producing evidence from which the fact trier could reasonably find the non-existence of such fact. In other words, it places on the opposing party the burden of going forward with the evidence or of making a prima facie case on that issue. If the opponent fails to meet this burden the presumptive fact should be assumed and the jury should be so instructed if the facts on which the presumption is based is established, but if the required burden is satisfied by the opponent the presumption disappears and the facts must be established from the evidence the same as though no presumption were ever involved and *it is not proper in such case to even mention in the instructions the existence of such presumption.* This court has many times held that such is the effect of presumptions generally and of this presumption in particular." (Emphasis supplied.)

In the case at bar, there was the uncontested physical evidence, outlined above, that the Mecham car was on the wrong side of the road. In addition, there was the testimony of Arthur Allen, the driver of the truck, that the Mecham car, when the two vehicles were about 35 or 40 feet apart, suddenly changed its course around the curve, came across the line to his side of the highway,

and came at him "headon." (R 365). On that basis, there was more than a prma facie case that Thomas Udell Mecham was not exercising due and proper care for the protection of his person and the preservation of his life, and on the contrary was creating an almost certain risk of head-on collision. Under such circumstances, it is not proper to even mention in the instruction the existence of such presumption as the Court's Instruction No. 11 delineated.

*In re Newell's Estate,* 78 Utah 463, 5 P. 2d, 230;

*Tuttle vs. Pacific Intermountain Express Co.,* Supra.

In the Tuttle case, the mention of the presumption in such circumstances was stated to be not prejudicial because the court "merely instructed that there was a presumption *in the absence of evidence to the contrary.*" But not so in this case. Here the jury were told the presumption existed until the contrary was *proven,* and the presumption was to be considered along with all the other facts and circumstances in the case. Here the jury was not told the cloak of the presumption was sluffed off and disappeared with a production of evidence as to how or why the accident happened, but was instructed that it was an element to be considered along with the other facts and circumstances. In other words, the presumption was evidence. Such is not the law in this State.

*Tuttle vs. Pacific Intermountain Express Co.,* Supra;

*In re Newell's Estate,* Supra;

*Ryan vs. Union Pacific Railway Company*, 46 Utah 530, 151 P. 71.

In the Ryan case, the Utah Court stated the law with respect to this presumption as follows:

> "*In the absence of evidence* there is a presumption that the deceased used due care and, for his protection, did all that reasonably was required of him. Had the court charged that and stopped, the charge would not have been erroneous. When, however, facts and circumstances are proven to show just what the deceased did, or failed to do, then his care, or the want of it, is to be determined, not on the presumption, but upon the facts and circumstances proven. That is, whenever the facts or circumstances are shown concerning which the presumption is indulged, the presumption ceases, and the controversy is to be decided by the weight of the evidence adduced. That is not what the court charged. As charged, the jury permitted to cast the presumption on the scales and to consider and weigh it with the proven facts and circumstances. There is a presumption of sanity, but when evidence respecting the sanity or insanity of the person whose mental condition is the subject of inquiry is adduced, the presumption, except as it bears on burden of proof, is spent and the controversy is to be decided on the weight of the evidence adduced. There, as here, the presumption calls for evidence; but when it is adduced the controversy must be decided on the evidence, not on the presumption. Here the court, regardless of what facts were proven as to the deceased's conduct, in effect charged that the presumption itself was evidence to be considered in connection with the proven facts. That was wrong."

The court's charge here was no "handkerchief over the blanket," but a whole new suit of clothes furnished after Defendant's evidence as to how the accident must have happened, stripped Plaintiff of the presumption's raiment.

## III. THE COURT ERRED IN FAILING TO GRANT DEFENDANT A NEW TRIAL.

### A. *Surprise, or the stange case of Mr. Carter.*

It has been observed by courts and commentators that one purpose of the Federal Rules of Civil Procedure, upon which our own rules are based, was to eliminate the element of surprise and concealment from the trial of law suits.

> I Barron and Holtzoff, Federal Practice and Procedure, Section 137.

Surprise, which ordinary prudence could not have guarded against, is a ground for new tral under Rule 59. It is submitted that Defendants were the unwitting victims of a carefully prepared and executed surprise.

Plaintiff rested late on the afternoon of Friday, January 25, 1952, after nearly two full days of testimony (R. 302). Defendants put on one preliminary witness to identify the map (Exhibit 8) and certain photographs (Exhibits 2, 3, 9, 10, 11 and 12) and the Court then recessed for the week end (R 318). On the following Monday afternoon, Defendants Allen rested (R 422). Thereupon, Plaintiff presented as a purported rebuttal witness one Alfred M. Carter, who testified he was fishing in Provo Canyon the day of the accident. He stayed at

the scene only five or six minutes and did not talk to anyone or see anyone he knew (R. 438). By a curious coincidence, he did not see or talk to anyone about the accident until a year and a half later when on the Saturday night after the Plaintiff had rested, he was visited by Mr. L. S. McCullough, one of the attorneys for Plaintiff (R 425-26). Yet all during the intervening period between the accident and the time of Mr. McCullough's visit, he had been working in close association with one Simmons, father of Plaintiff, in a group of Utah Construction employees at the Geneva Steel Plant (R 81).

Defendant J. H. Allen came into the case in June, 1951, when the insurance company withdrew and the amended complaint was filed. His counsel were handicapped by a year's delay in investigation, but used their utmost diligence and all their discovery rights under the Rules of Procedure to ascertain all they could about the case. Interrogatories were served on Plaintiff asking the names of the witnesses (R 11-12). Plaintiff replied with a "weaseling" answer naming some, but expressly excluding those known to her attorneys, her father-in-law or her brother-in-law. (R 13) Defendants were then forced to secure a court order directing Plaintiff to furnish those names she had excluded (R 21). The supplemental answer (R 22) named Ercanbrack and White, two of Plaintiff's principal witnesses at the trial of the action, as the eye witnesses, but did not mention Carter. Defendant then took the deposition of the father-in-law, W. O. Mecham, to learn more about the identity of the witnesses (R 482). He was asked about each of

the witnesses named in the answers to the Interrogatories, and on page 67 of his deposition, Line 22, there appears the following:

> "Q. Who is William White?
>
> A. He's a fellow from—I don't know whether that would be the steel plant, called the steel plant, or would be on the Springville road. He works in Provo."

Now William White did live on the Springville road (R 190), and Mr. Carter did work at the steel plant. Thus, it is apparent that W. O. Mecham knew of an eye-witness who worked at the steel plant, and Plaintiff's father must have known. Any person who had been a witness to an accident in which a man was killed and others were seriously injured, would be likely to discuss the matter with his fellow employees. It is stretching incredulity that Plaintiff's father, Simmons, did not hear of Carter's connection with the accident if, in fact, he had been there. Yet despite the court's order that the interrogations be answered "to convey all information that the plaintiffs and plaintiffs' attorney have at their disposal *regardless of the source*" (R 21) (empasis supplied), no mention of Carter was made until his dramatic appearance at the close of the trial.

It is also clear that Defendants used every legal means to avoid such surprise. They asked the names of witnesses on Interrogatories. They forced Plaintiff to make full disclosure. They had interviewed or taken the deposition of every witness called by Plaintiff except the mysterious Carter. What more diligence could have

been exercised to avoid just what hapepned?

Surprise coming at the close of the trial makes an even stronger case for a new trial to remedy the injustice done thereby. See

> *Delmas vs. Martin*, 39 Cal. 555, quoted with approval in *Whitfield vs. Debrincat*, 18 Cal. Op 2d 730, 64 Pac. 2d 960 at 962.

That latter case also supports the rule:

> "Where a party has used reasonable diligence to ascertain what his witness will testify to and has reasonable grounds to believe that the witness will testify to a certain state of facts and relies upon his doing so, and he does not do so, and the case is lost as a consequence, a new trial will be granted."

It is submitted that a corollary to this rule should be:

> "When a party has used reasonable diligence to ascertain the identity of the witness and what they will testify to and has reasonable grounds to believe that there were no other witnesses hiding behind billboards or fishing in streams nearby, and relies on that state of facts and the case is lost as a consequence thereof, a new trial will be granted."

B. *Newly Discovered Evidence.*

Until Carter testified, there was no credible evidence placing the car or truck in any other place than the photographs and the investigating officers placed them. Carter's testimony, if believed, raised a new issue of fact. Carter placed the truck and car, when he arrived on the scene, from the point on the river where he claimed to have been fishing, on the side of the hill around

the curve and up canyon from the location shown in the photographs and fixed by the investigating officers ( R 426-27).

To support its motion for a new trial, Defendants submitted affidavits of Louis Washburn, Burt Nichols, and Keith Taggart, who arrived at the scene at about the same time or before Carter, as Allen and Mousley were still taking out the injured Mechams from the car at their time of arrival, which both Allen and Mousley testified, without dispute, was done first. All of these proposed witnesses would testify that the vehicles immediately after the accident were at the places shown in the photographs and as testified by the investigating officers and not as testified by Carter. It is submitted that their testimony, if believed, would completely discredit the testimony of Carter and would furnish evidence on a point not in issue in the case in chief. As was said by this Court in

*Jensen vs. Logan City*, 89 Utah 347, 57 Pac 2d 708 at 723.

> "Where disinterested testimony on the vital point in a case is very scant, newly discovered testimony on that point appearing from affidavits in support of the motion for a new trial to be apparently reliable, when its appears that the movant for the new trial was not guilty of indiligence in failing to obtain the witness for the trial, and that there is no element of holding such witness in reserve for purpose of obtaining a new trial — generally picturesquely denominated in slang phraseology as 'an ace in the hole' —and it appears likely that such evidence would change the result, a new trial should be granted.

> While the granting or refusing of the motion lies in the sound discretion of the court, where there is grave supsicion that justice may have miscarried because of the lack of enlightenment on a vital point which new evidence will apparently supply, and the other elements attendant on obtaining a new trial on the ground of newly discovered evidence are present, it would be an abuse of sound discretion not to grant the same."

Plaintiff sought to answer Defendant's affidavits and support of its motion of a new trial by affidavits to the effect that Defendants knew or should have known of the proposed evidence and the testimony of these witnesses, and because of that fact, Defendants do not meet the requirement established by this Court in

> *Klopenstine vs. Hays,* 20 Utah 45, 57 Pac. 712, and reiterated in *Trimble vs. Union Pacific Stages,* 105 Utah 457, 142 Pac 2d 674,

that to entitle a defeated party to a new trial on the ground of newly discovered evidence, it must appear that he used reasonable diligence to discover and produce at the former trial the newly discovered evidence and that his failure to do so was not the result of his own negligence. This principle Defendants do not deny. But, it is submitted, this case is quite a different situation. The proposed evidence is to shed new light on an issue which was not raised until Carter testified on "rebuttal" at the close of the trial. Certainly if Defendants, by pre-trial discovery, had plucked this ace from Plaintiff's Counsel's sleeve, they would have been derelict in not supplying evidence to meet it of which they knew or should have known, but from all the Plaintiff's witnesses

that Defendants were able to discover and interview or subject to examination by deposition, there was no issue as to the locale of the accident or the vehicles immediately thereafter. The testimony of Washburn, Nichols and Taggart would have been merely cumulative until Carter's testimony was introduced, but after he testified, would have tended to make clear a fact as to which Carter's testimony may have raised a doubt. See

*Jensen vs. Logan City,* Supra.

It is submitted that the trial court, when acquainted with the surprise nature of Carter's testimony, the diligence of Defendants and their Counsel to avoid that hazard, and the availability of evidence which would discredit that new issue belatedly raised by Plaintiffs and which would conteract the psychological advantage with the jury which Plaintiff's tactics gained, should have, particularly in view of the physical evidence produced, granted a new trial. Only by a new trial can the effect on the jury of the last-minute surprise presentation of Carter be eliminated.

## SUMMARY AND CONCLUSION

Defendants submit that the undisputed physical evidence clearly places the collision in the Allen lane of traffic; and that therefore, the conclusion is inescapable that Thomas Udell Mecham was negligent as a matter of law in being on the wrong side of the road. Furthermore, there was no creditable evidence that Arthur R. Allen was negligent in any respect. On the basis of the evidence before it, the trial court should not have submitted to the jury the issue of Defendants' negligence and

liability, but should have directed a verdict of no cause of action.

But the trial court compounded that error by instructing the jury that Thomas Mecham was presumed to be a prudent and careful driver and that the jury was to consider that presumption along with the evidence in the case. Just how much weight the jury gave this imponderable shadow is not known, but suffice it to say, that they were instructed to weigh it is prejudicial error.

Finally Defendants, already the victims of a misunderstanding over insurance coverage and the withdrawal from the defense by the insurance company in midstream, became the victims of a surprise witness whose identity and existence was carefully hidden until the denouement in the closing moments of the trial created the psychological effect on the jury that strategy had envisioned.

On the basis of the foregoing, it is submitted that Defendants are entitled to a reversal of the judgment of the Court below.

Respectfully submitted,

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